Supreme Court, U.S.
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No. 94-511

In The

Supreme Court of the United States

October Term, 1994

FLORIDA ROCK INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The government's response fails to distinguish the Court's holding in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), from that of the Federal Circuit herein; and misconstrues the Federal Circuit's new partial taking doctrine, underscoring the need for immediate review.

1. Contrary to Respondent's assertion that the Federal Circuit "did not decide whether the facts of this case constitute a taking," (Resp. Br. 8), the Federal Circuit indeed held that Petitioner Florida Rock did not suffer a compensable "categorical taking" (App. 11, 32), because of the possibility of sales to persons without knowledge of the restrictions (App. 14 n.12), despite the fact that the Army Corps of Engineers' denial of a Clean Water Act permit left Florida Rock with no "allowable and practicable immediate use" of its property (App. 111).

The possibility of resale of oceanfront property in *Lucas*, 112 S.Ct. at 2895 n. 8, did not defeat the categorical taking determination where the court found the government had deprived the owner of all economically beneficial use by requiring the land to be left substantially in its natural state. *Lucas*, 112 S.Ct. at 2824-95. Nor should the possibility of the resale of Florida Rock's wetlands, burdened by federal regulations which require it be left in its natural state, enable the government to avoid the payment of just compensation in the instant case.

2. The government suggests that "the court's references to 'partial takings' are unfortunate," and acknowledges that the opinion "could create confusion." (Resp. Br. 10-11). Nevertheless, rather than cross-petitioning, the

government urges that because the Federal Circuit's holding that partial compensation is required "whether the taking is by physical occupation . . . or by regulatory imposition to preserve the property as a wetland" (App. 22-23) is "wrong," (Resp. Br. at 11), review by this court is not required.

The government insists that any "misunderstanding that might be generated by the [Federal Circuit's] opinion"[1] may likely later be resolved by lower court decisions. (Resp. Br. at 11.) Clearly such a resolution has not emerged during the period since publication of the opinion. Thus far, contrary to the government's view, the courts and commentators discussing the Federal Circuit's *Florida Rock* opinion, have consistently interpreted it as permitting compensation under the Fifth Amendment for a regulatory deprivation of less than all economic use.[2]

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[1] Pursuant to the Tucker Act, 28 U.S.C. § 149, the Federal Circuit is, of course, the appellate court to hear all appeals involving claims seeking "compensation for any taking that may occur through the operation of a federal statute." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,128 (1985).

[2] *See Creppel v. United States*, No. 94-5070, 1994 WL 647932, at *3 (Fed.Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed.Cir. 1994); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1573-79 (Fed.Cir. 1994) (Nies, C.J., dissenting) (App. 32-50); *Bowles v. United States*, 31 Fed.Cl. 37, 45 (1994); John J. Delaney and Emily J. Vaias, American Law Institute, ALI-ABA Course of Study, "Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation; A Survey of Selected Recent Cases" (Aug. 17, 1994), *available in* Westlaw, C930 ALI-ABA 23, 38-40; Michael M. Berger, American Law Institute, ALI-ABA Course of Study, "Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation; Recent Takings and Eminent Domain Cases" (Aug.

Such acknowledged confusion on a constitutional issue of first impression demonstrates the necessity for this court's review.

Respectfully submitted,

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17, 1994), *available in*, Westlaw, C930 ALI-ABA 221, 233-38; John L. Horwich and Hertha L. Lund, *Montana Supreme Court Unnecessarily Misconstrues Takings Law*, 55 Mont.L.Rev. 455 (Summer, 1994); Ronald L. Weaver and Mark D. Solov, *Emerging Property Rights Protection*, Fla.Bar J. (June, 1994), *available in* Westlaw, 68 Jun FLBJ 103.